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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/510,192	08/23/2005	Janel Fone	HO-P03067US0	6437

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EXAMINER	
HELM, CARALYNNE E	

ART UNIT	PAPER NUMBER
1615	

MAIL DATE	DELIVERY MODE
12/16/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/510,192	FONE, JANEL	
	Examiner	Art Unit	
	CARALYNNE HELM	1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *11 September 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,3-10 and 14-20* is/are pending in the application.

4a) Of the above claim(s) *6-10 and 14-20* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1 and 3-5* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *09/11/08*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Note to Applicant: References to paragraphs in non-patent literature refer to full paragraphs (e.g. 'page 1 column 1 paragraph 1' refers to the first full paragraph on page 1 in column 1 of the reference)

Election/Restrictions

To summarize the current election, applicant elected Group I where the composition is a complete balanced foodstuff.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1 and 3 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 recites that the composition is "adapted for a dog, cat, or a horse" but provide no additional recitation or teaching detailing what this adaptation entails. Thus the meaning of this recitation is unclear making the metes and bounds of the claimed subject matter unable to be ascertained by one of ordinary skill in the art.

Claim 3 is indefinite because it depends from a claim that has been cancelled. For the sake of application of prior art, claim 3 is interpreted as thought it depends from claim 1.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 4, and 5 are rejected under 35 U.S.C. 102(e) as being anticipated by Calton et al. (US Patent No. 7,223,417).

Calton et al. disclose a food product (complete and balanced foodstuff) where the content of leucine is approximately 3.5%, based upon an example with 21.8% amino acids of which 15.94% is leucine (as calculated by examiner; see example 4; instant claims 1, 4, and 5). Calton et al. disclose that their composition is made with approximately 43.6% water, thus their taught weight percentages are on “wet basis” (see column 5 lines 16-25). Applicant provides no guidance delineating what properties or components are required for a composition to be “adapted for a dog, cat or horse”. Thus since nothing of record would preclude this composition from being consumed by

a dog, cat, or horse, the composition of Calton et al. is "adapted for a dog, cat or horse". Therefore claims 1, 4, and 5 are unpatentable over Calton et al.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

The four factual inquires of Graham v. John Deere Co. have been fully considered and analyzed in the rejections that follow.

Claims 1 and 3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ray et al. (previously cited).

Ray et al. teach a low calorie snack food (complete and balanced foodstuff) where the content of leucine was measured to be 4.7% (see table I; instant claim 1). However, Ray et al. do not specifically teach the leucine being present at 2.3%. The

content of leucine, an essential amino acid, is a parameter whose benefits are known to those of ordinary skill in the art and thus the routine optimization of this parameter would have been well within the purview of one of ordinary skill in the art at the time of invention (see column 6 lines 51-54; instant claim 3). Therefore claims 1 and 3 are obvious over Ray et al.

Response to Arguments

Applicant's arguments filed September 11, 2008 have been fully considered but they are not persuasive.

Regarding rejections under 35 USC 102(b):

Based upon part of applicant's amendment, the Ray et al. no longer anticipates the claimed subject matter; however, some arguments presented by applicant are not persuasive. Applicant's arguments regarding Burns are puzzling since there was no "Burns" reference cited in the Office action. In addition, applicant argues that because they teach a wet food to have 70-90% moisture that the teachings of Ray et al. did not meet the limitation drawn to the proportions of components in the food on wet weight basis because the moisture content in Ray et al. was not within this range. Instant claim 1, however does not recite that the composition is a "wet food" per se. Since according to applicant's teachings, all classifications of food (dry, semi-moist, and moist (wet) – see paragraph 18) contain moisture (wetness), their compositions can each be represented on a wet weight basis (e.g. including moisture/water).

Regarding rejections under 35 USC 103(a):

Here applicant argues that one of ordinary skill would not have found it obvious to optimize the amount of leucine in the composition of Ray et al. because they did not recognize the connection between the leucine content and resulting effect on dogs. Applicant's disclosure was the basis for the discussion in the previous action regarding the quantity of leucine necessary to "enhance the learning ability of an animal" where the animal was a dog. One of ordinary skill in the art need not be led by the same reasoning as applicant in order to reach the same invention claimed by applicant. Leucine would have been recognized as an important nutritional element at the time of the invention. In particular, it had been recognized that ingestion of leucine enhances muscle recovery following exercise due to its involvement in protein synthesis (see Anthony et al. Journal of Nutrition 1999 129:1102-1106, abstract, page 1102 column 2 paragraph 2-page1103 column 1 line 13, page 1104 column 2 paragraph 1, and page 1105 column 2 paragraph 5 in particular). Based upon the population that would consume the food product, one of ordinary skill in the art would have found it obvious to optimize the amount of leucine to produce the desired recovery, protein synthesis, or basic health outcome.

Rejections and/or objections not reiterated from previous office actions are hereby withdrawn.

Conclusion

No claim is allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CARALYNNE HELM whose telephone number is (571)270-3506. The examiner can normally be reached on Monday through Thursday 8-5 (EDT).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Caralynne Helm/
Examiner, Art Unit 1615

/MP WOODWARD/
Supervisory Patent Examiner, Art Unit 1615